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No. 84-1907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KAISER ALUMINUM & CHEMICAL CORPORATION
and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and
BARBARA F. CLISBY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER STATEMENT OF QUESTION PRESENTED

Should this Court grant certiorari to review the Court of Appeals' affirmance of a jury verdict in an 11-year-old antitrust case, after three jury trials. The questions raised by Petitioners, as to how a dominant firm with monopoly power must conduct its business in relation to smaller competitors:

- ¶ Were not raised at trial or in the court of appeals; and
- ¶ Would not be case dispositive under the special facts of this case, where the dominant firm had engaged in a wide range of unfair, retaliatory and anti-competitive practices in addition to the price squeeze; and
- ¶ Have been fully addressed, put to rest and resolved in Respondents' favor by this Court's recent opinion in *Aspen Skiing Co. v. Aspen Highlands Corp.*, 53 U.S.L.W. 4818 (U.S. June 18, 1985).

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OPINIONS BELOW.

The Opinion and Judgment of the Court of Appeals dated December 27, 1984, reported at 752 F.2d 802, is reproduced in Pet. App. "B" and "C". The Opinions of the United States District Court for the Eastern District of Pennsylvania (Shapiro, J.), reported at 518 F. Supp. 102 and 559 F. Supp. 922, are reproduced in Pet. App. "D" and "E", respectively. The Opinion of the Court of Appeals in a prior appeal decided on May 24, 1978, and reported at 579 F.2d 20, is reproduced in Pet. App. "F".

JURISDICTION.

The judgment of the Court of Appeals (Pet App. A-31-32), affirming a treble-damage award of $9,567,939 was en-

tered on December 27, 1984. Kaiser's timely petition for rehearing and suggestion of rehearing in banc was denied by Order dated March 8, 1985, with Circuit Judges Adams and Becker dissenting (Pet. App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254-(1).

STATUTE INVOLVED.

The only remaining claim in this case arises under Section 2 of the Sherman Act, 15 U.S.C. § 2, which provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

I. PRELIMINARY STATEMENT

The petition for certiorari in this case raises abstract and esoteric economic arguments having no relationship to the evidence, or the reasonable inferences therefrom, when the evidence is viewed in the light most favorable to respondents, as must be done after the two jury verdicts for respondents in this case. Moreover, petitioners did not raise these arguments in the District Court by a motion for directed verdict. They did not except to the trial court's charge to the jury on these issues, and did not raise these issues by post-trial motions. Finally, petitioners did not make the arguments to the Court of Appeals which they now advance for the first time before this Court. On these procedural grounds alone, the petition is without merit and should be denied. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Finally, the opinion of the Court of Appeals is not in conflict with any decision by any other circuit or any decision of this Court. Rather, it is fully consistent with, and strongly reinforced by, this Court's recent unanimous opinion in *Aspen*

Skiing Co. v. Aspen Highlands Corp., 53 U.S.L.W. 4818 (U.S. June 18, 1985), which examined and put to rest the various issues which respondents now seek to raise, relating to how a dominant firm with monopoly power must fairly deal with its competitors.

The evidence in this case, as in *Aspen Skiing*, supported the jury's finding that petitioners intended to use their uncontested monopoly power (in excess of 80% market share) to put a small competitor out of business—which is exactly what happened—and to monopolize the industry.

II. COUNTER STATEMENT OF THE CASE

A. The Essential Facts

Stated bluntly, Petitioners have so misrepresented the record in this case, principally by their omissions, that Respondents must set the record straight by a more complete counterstatement of the facts in this case:

Respondents (plaintiffs in the District Court) are the three individual shareholders of Columbia Metal Culvert Company Inc. ("Columbia"), which in 1974, filed this antitrust suit against petitioners, Kaiser Aluminum and Chemical Co. ("KACC") and its wholly owned subsidiary, Kaiser Aluminum and Chemical Sales Inc. ("KACSI") (collectively referred to as "Kaiser").

Kaiser is a large, vertically integrated aluminum producer in the highly concentrated aluminum industry. In the late 1960's and early 1970's, Kaiser dominated the market for aluminum culvert pipe. There is no dispute that Kaiser controlled at least 80% of the culvert pipe market for the United States as a whole, and also 80% of the culvert pipe market for the Middle Atlantic States, the relevant geographic area in this case. The evidence also showed that Kaiser dominated the sale of aluminum coil and sheet of alloy #H3004, which was the raw material used for aluminum culvert pipe. Kaiser was the acknowledged price leader and as such effectively set the prices for this raw material and controlled the market.

Respondents formed Columbia in 1962 to manufacture aluminum culvert pipe, primarily for use in highway and housing construction. Throughout the 1960's, Columbia, with Kaiser's assistance, actively promoted aluminum pipe for numerous highway and construction jobs in the Mid-Atlantic area. Kaiser was Columbia's (and the United States') principal supplier of aluminum sheet and coil. By the early 1970's, Columbia had become the largest independent fabricator of aluminum culvert pipe in the Mid-Atlantic region.[1]

Columbia, as its business expanded, wanted, as a matter of sound business practice, to reduce its reliance on Kaiser as its sole source of raw material. It therefore started purchasing some aluminum coil from Reynolds, a competitor of Kaiser. When Kaiser learned of this, its retaliation for Columbia's refusal to purchase all its raw materials exclusively from Kaiser was swift, certain, and devastatingly effective:

> 1. Kaiser's manager of its Highway Products Division threatened to open a Kaiser pipe fabricating plant "across the street" from Columbia, if Columbia bought its raw material from any supplier other than Kaiser.[2]

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[1] In its fiscal year ending May 31, 1973, Columbia sold approximately 2,200,000 pounds of aluminum culvert pipe, App. 6099a, for $1,300,000 in gross sales—Columbia's best year. App. 6131a. The history of Columbia is more fully discussed in the first Court of Appeals' opinion in this case, *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Co.*, 579 F.2d 20, 23 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). "App." refers to the appendix in the court of appeals.

[2] An employee of Reynolds Aluminum testified that Holmes Collins, Kaiser's manager in charge of its aluminum culvert pipe division, said that "if Mr. Bonjorno (Columbia) started buying his metal from other than Kaiser, he [Mr. Collins] would be tempted to go in with a plant and compete directly with Columbia Metal . . . the phrase is to put a plant next door or across the street, or something that would carry that meaning." App. 1128a-29a.

Threats such as the ones made by Mr. Collins are relevant proof of predatory intent to exclude competitors. *Aspen Skiing*, 52 U.S.L.W. at 4824 n.39, discussed more fully at pp. 19-21 below.

2. Kaiser refused to sell Columbia raw material after Columbia insisted on also buying from Reynolds. App. 177a, 183a, 1482a. Pet. App. A-13, A-120.[3]

3. Kaiser, within one year after the Holmes Collins threat, established its plant forty miles from Columbia, even though the entire Eastern Seaboard north of Florida did not have any culvert pipe manufacturer specializing in aluminum, and the evidence showed that Kaiser had been actively considering a plant elsewhere. App. 1593a, 1600a-01a, 1791a.

4. Kaiser's intent to exclude independent fabricators such as Columbia, from the aluminum culvert pipe market was further carried out by retaliatory anti-competitive threats to Alcoa, the principal competitor of Kaiser,[4] and to another pipe fabricator dependent on Kaiser as a source of supply.[5]

5. Because of Kaiser's "aggressive" pricing (App. 4994a) and strategy of dominance in the aluminum culvert

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[3] Kaiser's myopic view of the evidence in this case constantly overlooks Kaiser's improper refusal to sell to Columbia because of Columbia's refusal to remain subservient to Kaiser. This is demonstrated by the statement of Holmes Collins, in a meeting with Columbia, that "we will let you grow," App. 165a, 1662a. The court of appeals appropriately relied on this statement in concluding the evidence allowed the jury to find that "Kaiser would control Columbia's growth and market." Pet. App. A-13. Kaiser's refusal to sell to Columbia in these circumstances was itself illegal, *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 466 (1941).

[4] "[Holmes Collins stated] that he would welcome Alcoa getting into this market to support their efforts but that we [Alcoa] would have to do it like Kaiser had done and invest in facilities and go all the way as a culvert pipe manufacturer, and that if we thought that we could sit back and enjoy a participation in this market by merely being a supplier of coil sheet to independent pipe fabricators, we have another thing coming, or some words to that effect." App. 1085a. The court of appeals appropriately relied on this evidence. Pet. App. A-13 n.2.

[5] Mr. Collins made a similar threat to U. S. Aluminum and Steel Highway Products Company ("U. S. Aluminum"), to the effect that if they bought from Reynolds, Kaiser would not sell U. S. Aluminum the special corrugated sheet that it could only get from Kaiser, App. 1287a-89a. The owner of U. S. Aluminum testified that Kaiser followed through on this threat. App. 759a-63a. The court of appeals relied on this evidence to show predatory intent to monopolize.

market, Alcoa decided not to enter that market, either as a fabricator of pipe itself, or as a regular supplier to independent fabricators such as Columbia. (*See supra* fn. 4).

6. Kaiser recruited Robert Kennedy, Columbia's best salesman, and set him up as a Kaiser distributor with highly favorable financial benefits, and a liberal line of credit, against the recommendation of Kaiser's credit department. App. 4462a, 4464a.

7. Kaiser purposely used Kennedy's knowledge of Columbia's customers to take business away from Columbia. Kaiser paid Kennedy a "finder's fee" for getting a large bid for Kaiser while Kennedy was still employed by Columbia, and set up a "joint check" arrangement for Kennedy so that Kennedy could make sales in excess of his credit limit. Kaiser knew that Kennedy used Columbia's confidential information to win bids, which benefited Kaiser. Kennedy became a Kaiser distributor as soon as Kaiser opened its New Castle, Delaware plant.

8. Kaiser sold pipe from its New Castle plant at drastically *lower* prices in Southern New Jersey, where Kaiser was in direct competition against Columbia, than it did when competing in other locations. Since Kaiser presented no economic justification whatsoever for its lower pricing practices in Southern New Jersey, the jury was free to conclude that this further evidenced Kaiser's intent to destroy Columbia. *See Aspen Skiing, supra.*

9. In January 1974 Kaiser withdrew its commodity price list for raw material aluminum coil. This action was intentionally strategic. It resulted in a price squeeze which was designed to, and did, severely injure Columbia.[6]

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[6] KACSI's Highway Products Department prepared a report each year which stated its strategic objectives. These reports boasted of KACSI's dominance and control of the market and prices. *See* App. 7993a, 8026a, 8034a.

Respondents' expert, Dr. Oliver Williamson, a widely published and recognized economist, now Professor of Economics, Yale University, described how Kaiser's actions reflected strategic decisions by a dominant firm with the intent, and effect, of excluding independent competitors; he also explained how this conduct was anticompetitive and injurious to the public. App. 587a-650a.

10. Less than one year after Columbia had asserted its right to purchase products from other suppliers, Kaiser opened the New Castle plant, hired away and set up Columbia's best salesman as a Kaiser distributor, withdrew the commodity price for raw material, and sold pipe at drastically lower prices in Southern New Jersey. Columbia started business that year as a strong, viable competitor; it ended the year dormant, lifeless, destroyed.

Kaiser's petition simply ignores all the above facts and the overwhelming evidence supporting them. In so doing, it refuses to recognize the well-established legal principle that all of Columbia's evidence must be viewed in the light most favorable to Columbia, and that contrary evidence introduced by defendants must be rejected. *Aspen Skiing, supra; Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-01 (1962).

B. Prior Proceedings

1. First Trial—1977

The first trial, held in 1977, ended in a directed verdict against Columbia, largely because the District Court wrongly concluded that the relevant market was broader than aluminum culvert pipe.

In 1978, the court of appeals for the Third Circuit, opinion by Judge Arlin Adams, reversed the judgment in favor of Kaiser and held that Columbia's evidence was sufficient to establish Kaiser's liability for violations of Section 2 of the Sherman Act, based on Kaiser's control of over 80% of the aluminum culvert pipe market:

> there was sufficient evidence from which the jury could have inferred that KACSI attempted to drive Columbia out of business. Holmes Collins, the manager of KACSI's highway division, was heard to say that if Columbia bought metal from Reynolds, he, Collins would locate an aluminum culvert plant in

> Columbia's "backyard" . . . . From the testimony and from KACSI's actions against its business interests, the jury could have inferred that KACSI intended specifically to punish Columbia for buying from Reynolds. And given the formerly close relations between KACSI and Columbia, the jury might well have inferred that KACSI knew of the drastic impact its maneuvers would have on Columbia's prospects for survival. Such activities, engaged in by an entity controlling more that 80% of the market, would be sufficient to allow the jury to find both the anticompetitive effects and intent requisite to liability for monopolization or attempted monopolization.

Columbia Metal, supra, Pet. App. A-134-36.

2. Second Trial—1979

In the second trial, in 1979, Columbia's evidence in the 1977 trial was largely repeated. Columbia's evidence rested on all of the facts discussed above, and did not, as Kaiser's petition implies, rest solely on the issue of price squeeze.

At the second trial, Kaiser, in its liability defense, did not present any expert testimony on the price squeeze issue and did not present any factual evidence of efficiencies or other business justifications for its actions toward Columbia. Kaiser's principal defense was that the product market was not limited to aluminum culvert pipe, but rather extended to include steel and concrete culvert pipe, a very broad market in which Kaiser did *not* have monopoly power. Kaiser's other principal defense was that Columbia's demise was caused by undercapitalization and marketing mistakes, and that it did not suffer any "antitrust injury" from Kaiser's actions. The jury rejected both of these defenses.

The jury answered seven specific interrogatories, finding in favor of Columbia on all issues, as summarized below:

a. the relevant product market was aluminum culvert pipe (a finding not presently contested by petitioners);

b. Kaiser monopolized the aluminum culvert pipe market; and

c. Kaiser's violations were a material and proximate cause of injury to the business and property of Columbia.[7]

3. Third Trial—1981

The district court thereafter granted a third trial on damages only, Pet. App. A-33, which resulted in another jury verdict, Pet. App. A-74, on December 2, 1981, which increased the amount of the damages assessed against Kaiser. On post-trial motions, the district court granted, in part, Kaiser's Motion for Judgment Notwithstanding the Verdict, but this ruling was reversed by the court of appeals' opinion of December 27, 1984, which restored the damages judgment entered on December 4, 1981 on the jury's verdict (Pet. App. A-5).

4. Summary of Court of Appeals' Opinion

The court of appeals' opinion carefully considered all of Kaiser's arguments, even granting a fresh review of the sufficiency of Columbia's evidence of monopolization, despite the fact that the same court found the same evidence sufficient in its earlier 1978 Opinion. It unanimously agreed that the evidence showed that Kaiser attempted to control its competitors and acted with the intent to destroy Columbia. The court of appeals specified some of the key evidentiary points it relied on:

> There was evidence that Kaiser attempted to control the independent fabricators by requiring them to purchase all of their raw materials from Kaiser . . . . There was testimony that Holmes Collins, the Kaiser manager of the division that manufactured and marketed the aluminum pipe, threatened to open a pipe fabrication plant "across the street" from Columbia if it purchased its raw materials from other sources . . . . Finally, there was evidence that Holmes

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[7] Columbia had also brought a conspiracy charge against KACC and KACSI on the now rejected intracorporate conspiracy doctrine, see, *Copperweld Corp. v. Independence Tube Co.*, 104 S. Ct. 2731, (1984). The Court of Appeals found that the evidence supporting the separate jury verdict on the Section 2 monopolization interrogatory was sufficiently independent of the conspiracy issue and rejected petitioners' claim that a new trial was required because the 1979 jury had also considered the intracorporate conspiracy doctrine. Pet. App. A-8 to 11. Petitioners do not raise this issue in this Court.

> Collins told Columbia's owners that Kaiser would control Columbia's growth and market.

Pet. App. A-13.

After reviewing the evidence, the court stated:

> From this evidence, a jury could infer that Kaiser wanted to control the source of the raw materials for the independent fabricators and thus, indirectly, wanted to control the price of independents' finished pipe. The mere location of a plant, or the unilateral refusal to deal may not, by themselves, be antitrust violations. However, the combination of the threats as well as evidence that Kaiser's management had originally requested that the plant be located elsewhere is evidence from which a jury could legitimately infer that Kaiser attempted to control its competition, and failing that, tried to destroy it.

Pet. App. A-13.

On the price squeeze issue raised by Kaiser, the court of appeals held:

> There was evidence that the squeeze was not caused by natural market forces. Pet. App. A-17.
>
> Given these facts, there was sufficient evidence for the jury to conclude that Kaiser not only possessed the power to create the price squeeze, but that it exercised that power to destroy its competition. *See United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945).

Pet. App. A-18 to 19.

The court of appeals based its ultimate holding on well-established antitrust principles:

> When a monopolist competes by denying a source of supply to his competitors, raises his competitor's price for raw materials without affecting his own costs, lowers his price for the finished goods, and threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have crossed the shadowy barrier of the Sherman Act. *See* Handler, Some Unresolved Problems of Antitrust, 62 Colum. L. Rev. 930, 934

(1962). Given the evidence of Kaiser's anticompetitive behavior, we hold that there was sufficient evidence to permit the monopolization claim to go to the jury.

Pet. App. A-19 to 20.

Given this exhaustive review of the evidence, and the court's application of settled legal principles to the record, there is no reason to grant certiorari in this case.

III. REASONS FOR DENYING THE PETITION

A. Summary

We first summarize below, the reasons why this Court should deny the petition:

1. The petition fails to cite, much less satisfy, any of the prerequisites for certiorari prescribed in rule 17 of the rules of this Court.

Specifically, the petition fails to assert that the decision conflicts with any decisions of other courts of appeals or decisions by this Court. Furthermore, the issues presented by petitioners, pertaining to how a dominant firm must conduct its business in relation to its smaller competitors have been fully addressed and resolved in respondents' favor by this Court's recent decision in *Aspen Skiing Co. v. Aspen Highlands Corp., supra.*

2. Petitioners, by failing to raise the issues now presented, before either the trial court or the court of appeals, should not be permitted to present these now, for the first time, to this Court. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

3. A resolution of the narrow price squeeze issues presented by Petitioner would have no effect on the outcome of this case, in light of the overwhelming evidence of other retaliatory, unfair, and anticompetitive practices, in addition to the price squeeze, engaged in by Kaiser, the dominant firm with monopoly power in the relevant market. The jury found, under proper instructions from

the court, that the totality of Kaiser's acts were intended to, and ultimately did, destroy its smaller competitor.

4. Kaiser is incorrect in its contention that the court of appeals' opinion constitutes an improper extension of the price squeeze rationale in *United States v. Aluminum Co. of America, supra.*

First, Kaiser cannot escape liability in this case on the contention that it did not sell raw material to Columbia, since the jury found, based on compelling expert and other market evidence that Kaiser was the price leader in the raw material, and that it knew that its hostile pricing actions in the raw material would injure Columbia, its smaller competitor, in the finished product.

Second, Kaiser's contention that there must be proof of monopoly power in the raw material is incorrect as applied to this case, because, as noted above, Kaiser excercised strong price leadership and knew full well that its pricing of the raw material would injure its rival. Furthermore, Kaiser's contention is factually incredible, since the record establishes that it did in fact have dominant and monopolistic power in coil as well as in finished pipe.

B. The Petition Fails To Show That This Case Satisfies Any Of The Traditional Prerequisites For A Grant Of Certiorari Stated In Rule 17 Of This Court

The petition for certiorari should be denied because it does not satisfy any of the prerequisites for certiorari prescribed in rule 17 of the rules of this Court. Kaiser does not even cite rule 17.

The petition does not claim, and could not claim, that the decision of the court of appeals conflicts with any decision of another court of appeals. Moreover, the petition does not claim that the decision of the court of appeals conflicts with any past decision of this Court. Instead of presenting a conflict, the petition simply raises the same legal question decided by this Court this Term in *Aspen Skiing*—whether a jury, evaluating all

of the evidence, may conclude that a corporation, with admitted monopoly power, violates Section 2 of the Sherman Act by engaging in a series of predatory acts all intended to injure a small competitor. *Aspen Skiing* confirms that the court of appeals' decision on that issue was correct.

As an examination of the court of appeals' opinion makes clear, the court simply applied settled antitrust principles to the special facts of this particular case. The issues of evidentiary sufficiency have been resolved against Kaiser twice by the court of appeals, and twice by a jury. As both opinions of the court of appeals demonstrate, the evidence was more than sufficient to show that Kaiser engaged in a host of viciously unfair predatory actions—including repeated threats, intimidation, unfair commercial practices, and use of price squeeze tactics—all designed for the purpose of causing competitive injury to respondents. Under *Aspen Skiing,* this constitutted a blatant violation of Section 2 of the Sherman Act.

Beyond this, the abstract economic issues discussed in the petition, regarding "price squeeze" behavior, were not presented in the district court and were not raised on appeal, or mentioned in the court of appeals' opinion. This is therefore a highly inappropriate case to resolve such issues. It would be particularly inappropriate to do so on this record and in the absence of a conflict among the circuits, because cases involving allegations of a "price squeeze" are rarities in antitrust litigation. A review of antitrust decisions shows that price squeeze claims have been litigated in only a handful of cases in this century. Moreover, the "market" as it existed in 1973-1974 has drastically chanqed since that time.[8] Thus, a decision on the facts of this case would be of only historical interest.

In these circumstances, review by this Court is plainly unwarranted.

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[8] Drainage pipe is now made of many different materials which were just evolving or not even in existence as of 1974 such as polypropylene-lined plastic pipe, polyethylene pipe, and aluminized steel. There are also new entrants in the market for all types of culvert pipe as well as aluminum culvert pipe.

C. Petitioners Did Not Preserve In The Lower Courts The Issues Presented To This Court

Kaiser's Petition has isolated two esoteric legal issues, which are totally unrelated to the real facts of this case. In this case, the jury, and the court of appeals twice found that Kaiser had engaged in a host of viciously unfair anticompetitive practices, including but by no means limited to a price squeeze. This gross abuse of its undisputed monopoly power, was calculated to injure and did destroy a small competitor.

Kaiser's *first* issue is whether a vertically integrated producer has a "duty" to price its raw materials and finished products so as to avoid a price squeeze on an independent fabricator. The *second* issue is whether liability for a "price squeeze" can be based on "price leadership" in the raw material market even though Columbia, the injured competitor, did not purchase raw material from Kaiser.

As we discuss at pp. 19-26 below, there is no merit to either of Kaiser's contentions. Kaiser's petition should be denied on procedural grounds, because Kaiser failed to preserve these issues, and this fact alone requires denial of its Petition. *See Adickes, supra,* at 147 n.2, (1970), holding that the Court will not consider issues "neither raised before nor considered by the Court of Appeals." *Accord California v. Taylor,* 353 U.S. 553, 555-557 n.2 (1957). *See also NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 163-64 (1975).

1. Kaiser did not Raise These Issues in the District Court

Kaiser did not raise these issues when it moved for a directed verdict, did not request a jury charge on these issues, and did not take exception to the charge given to the jury on these issues. Thus, even if this Court were to hear this case, irrespective of how it ruled substantively, Kaiser would have no right to relief and the court of appeals' judgment would stand.

a. Kaiser did not preserve this issue under rule 50(b)

Kaiser's Motion for Directed Verdict at trial did not include any reference to Columbia seeking to impose any

"duty" on Kaiser concerning its prices, or any reference to Kaiser's liability being based on the issue of "price leadership," even though "price leadership" was a distinct part of Columbia's evidence and central to its theory of Kaiser's liability for the price squeeze at both liability trials.[9]

Pursuant to rule 50(b) of the Federal Rules of Civil Procedure ("F.R.C.P."), a legal issue not raised in a motion for directed verdict may not be grounds for the granting of a motion notwithstanding the verdict. This is the uniform rule in virtually all of the circuits.[10]

Further, Kaiser did not raise the issues it now seeks to present, regarding the "duty" of a vertically integrated manufacturer, and the issue of "price leadership", in its Motion for Judgment Notwithstanding the Verdict, filed pursuant to Rule 50(b) after the 1979 liability trial. (App. 5360a).

b. Kaiser did not preserve these issues under rule 51

Similarly, Kaiser did not raise any of the issues presented to this Court for review by requesting instructions to the jury, or by taking exceptions to the charge to the jury, pursuant to Rule 51, F.R.C.P. Thus, these issues are waived.

In point of fact, the district court's charge to the jury on the price squeeze issue was very close to the charge that Kaiser had requested, App. 5288a-89a, and is reprinted at pages R-A-1 to 2 of the Appendix to this Brief. ("Resp. App."). Thus, not surprisingly, Kaiser's counsel took no specific exceptions. (App. 3986a). Indeed, Kaiser's counsel told the trial judge that

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[9] Kaiser, in its Motion for Directed Verdict (App. 5197a), contended that it could not be liable because it was not selling raw material to Columbia, and that there was insufficient evidence to show that Kaiser "dominated" the sale of raw material used for aluminum culvert pipe.

[10] *See Systemized of New England Inc. v. SCM, Inc.*, 732 F.2d 1030, 1035-36 (1st Cir. 1984); *Lowenstein v. Pepsi Cola Bottling Co.*, 536 F.2d 9, 11 (3d Cir.), *cert. denied*, 429 U.S. 966 (1976); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Johnson v. Rogers*, 621 F.2d 300, 305 (8th Cir. 1980); *United States Industries, Inc. v. Blake Construction Co., Inc.*, 671 F 2d 539, 548 (D.C. Cir. 1982).

her instruction to the jury, that Kaiser's not selling raw material to Columbia could be a defense to the price squeeze claim, was "clear and right." (App. 3986a). Therefore, Kaiser has waived any grounds for relief as to this issue, particularly because Kaiser's counsel did not request any other instructions concerning price leadership, or any other issue raised in the Petition. Specifically, Kaiser never contended in the district court that Columbia was obliged to prove Kaiser had monopoly power in a separate raw material market.

Kaiser's counsel only made a general exception to the charge for the "failure of the Court to give the instructions that we requested which you did not give." App. 3993. Since there was only a blanket exception to the court's charge and no specific exception on the points now raised in this petition, there is no reason for this Court to grant review of this issue. A blanket exception to a jury charge is insufficient to preserve any legal positions for review.[11]

Since there is no dispute concerning the district court's charge to the jury on the issue of monopolization, the judgment of the court of appeals would be affirmed irrespective of how this Court might rule on the Petition for Certiorari.

2. Kaiser did not Raise These Issues in the Court of Appeals

Furthermore, the issues raised in the Petition were not raised in the court of appeals and not discussed by the court of appeals in its opinion.

In the court of appeals, Kaiser did not claim that the result in this case imposed a "duty" on Kaiser to price its raw material or finished goods in any particular way, and did not claim that

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[11] *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Burns v. United States*, 274 U.S. 328 (1926); *Pennsylvania R.R. Co. v. Minds*, 250 U.S. 368 (1919); *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 248 U.S. 334 (1919); *Thiede v. Utah Territory*, 159 U.S. 510 (1895). This Court has further clarified this rule by stating that a general exception will not be grounds for relief if any of the instructions being generally excepted to is correct. *Palmer v. Hoffman, supra; Holloway v. Dunham*, 170 U.S. 615 (1898); *Thiede v. Utah, supra.*

price leadership was, as a matter of law, an improper theory on which Kaiser could be held liable for the price squeeze. In its brief in the court of appeals, Kaiser claimed principally that Columbia's evidence did not meet the legal standards required by Judge Learned Hand in *United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945), or the standards set forth by Dr. Williamson, Columbia's expert economist.

Kaiser did argue in the court of appeals that it should not be held liable for a price squeeze when it had not sold raw material to Columbia during the period of the squeeze. Kaiser claimed there was insufficient evidence of monopoly power in a purported "raw material market," and insufficient evidence of price leadership. However, these are clearly "fact-bound" issues, and it would be highly inappropriate, and contrary to this Court's practice of not reviewing the sufficiency of the evidence,[12] particularly where the district court and the court of appeals have twice decided that the jury had sufficient evidence to find Kaiser liable for monopolization. This Court's review of these fact-bound issues could have no precedential impact on other cases, and no importance for future interpretations of the antitrust laws.

D. The Evidence, Reviewed In The Light Most Favorable To Columbia, Was Sufficient To Find Kaiser Liable For Monopolization, Without Even Considering The Challenged Evidence Of A "Price Squeeze"

The price squeeze evidence was only one part of Columbia's evidence in this case.

The court of appeals relied on all of Columbia's evidence in affirming the judgment based on the jury's verdict. Although Kaiser's petition attempts to make this case appear as if it turned on the "price squeeze" issue, that is not true. *See* Pet. App. A-13 and A-19.

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[12] *United States v. Johnston,* 268 U.S. 220, 227 (1925); *Berenyi v. District Director, Immigration and Naturalization Service,* 385 U.S. 630, 635 (1967), explaining that the Supreme Court does not sit as a court for correction of errors in fact finding, and will not "undertake to review concurrent findings of fact by two courts below."

As noted above at pages 3-7, Columbia's evidence established that Kaiser's exclusionary, anti-competitive actions towards Columbia, as detailed in the Counter Statement of the Case, were intentional, extensive and devastatingly effective. Indeed, the district court, in summarizing the evidence after the 1979 liability trial, noted that the same evidence that had been found sufficient by the court of appeals in its first opinion, in 1978, was presented to the jury at the second trial. Pet. App., A-43 to 44. The district court went on to summarize that evidence, and did not even mention the testimony concerning the price squeeze in concluding that "the evidence was sufficient to support the jury's conclusion that the defendants monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act." [13] Pet. A-43.

Since the District Judge's opinion did not even mention the price squeeze, it is obvious that she believed that the other evidence, summarized above, was independently sufficient to support the verdict in favor of respondents under Section 2.

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[13] Holmes Collins' threat to place an aluminum culvert plant near Columbia if Columbia purchased from Reynolds, and the later placement of a plant in New Castle, Delaware (N.T. 1228) that was originally planned for Virginia (N.T. 1533, 1540-41, 1730), were submitted to the jury. Again, there was evidence that, "transportation of culvert is a significant item of expense for the product in question and a local manufacturer of culvert has an advantage over one whose plant is at a distance from the place of delivery" (*Columbia Metal*), from which the jury might infer intentional harm caused Columbia by Kaiser's placement of its plant (N.T. 2317-18, 2840).

Again, an inference could be drawn from evidence that the Delaware KACSI plant sold culvert at lower prices than other plants even though Delaware costs were no lower (N.T. 1734, 2544-45), that KACC transferred sheet and coil to KACSI at an accounting price less than production cost and well below market price (N.T. 1964, 3654), and that Collins of KACSI extended credit to Kennedy, formerly a Columbia salesman, against the recommendation of the KACSI credit department (N.T. 1849-63, 2525-29, 2842-49, 2854, 2997, Exhibits P-75, P-24, P-5).

The Arvay testimony, specifically noted by the Third Circuit, *Columbia Metal, supra* at 31 n.43, again supported plaintiff's theory (N.T. 719, 729, 752). Finally, an inference that Kaiser controlled more than 80% of the relevant market was again reasonably supported by the evidence. (N.T. 73-75, 780, 161, 1809, 1810, 1814, 2509. Exhibit P-201). Pet. App. A-43 to 44.

See also the district court's opinion after the 1981 damage trial. Pet. App. A-105.

Similarly, the court of appeals was correct in holding that Kaiser's refusal to sell to Columbia, the Holmes Collins threats to Columbia, U.S. Aluminum, and Alcoa, and the other evidence reviewed by the district court, when taken together, were sufficient to prove monopolization. See *supra*, pp. 3-7.

Columbia's total evidence of Kaiser's abuse of monopoly power was sufficient to support a verdict under Section 2, without giving any weight to the evidence concerning a price squeeze.

E. There Is No Need To Review This Case Because the Opinion Of The Court Of Appeals Is Fully Consistent With This Court's Recent Decision In *Aspen Skiing*

The recent unanimous decision of this Court in *Aspen Skiing Co. v. Aspen Highland Skiing Corp.* 53 U.S.L.W. 4818 (June 18, 1985), strongly supports the decision of the court of appeals and provides still another compelling reason why the court should not grant Kaiser's petition. Indeed, all of Kaiser's contentions have been effectively refuted by this Court's opinion in *Aspen Skiing.*

In *Aspen Skiing,* as in the present case, the petitioners sought to persuade this Court to adopt a novel economic theory as a means of securing a reversal of a jury verdict. There, the Petitioner claimed that the judgment in the lower courts was improper because it rested on the assumption that a firm with monopoly power has a "duty" to cooperate with smaller rivals in a marketing arrangement in order to avoid violating Section 2 of the Sherman Act. This Court unanimously held, however, that the evidence, viewed in the light most favorable to the plaintiff, as the verdict winner before the jury, did not turn on any alleged "duty" to cooperate with smaller rivals, but instead, conformed to traditional Sherman Act Section 2 legal requirements.

In this case, Kaiser has couched its "questions presented" in the same manner as the Petitioner in *Aspen Skiing,* asking

this Court to exercise its certiorari jurisdiction on the erroneous assumption that the court of appeals imposed a "duty" on Kaiser to price its raw materials and finished products in a particular way. Just as this Court in *Aspen Skiing* rejected the claim that the the lower Court's judgment in that case rested on an abstract legal proposition about the "duty" to cooperate with rivals, so should this Court reject this Petition, because the court of appeals in this case did not announce any "duty" concerning pricing of both raw materials and finished goods. Further, as noted above, the judgment of the court of appeals is fully supported by other evidence, sufficient in itself under traditional Sherman Act requirements.

Kaiser offered no expert testimony on the "economic" aspects of Columbia's price squeeze evidence, nor any evidence on business justifications or efficiency reasons for its actions. This is relevant in finding that Kaiser's actions intended to exclude Columbia. *Aspen Skiing, supra,* at 4824.

Aspen Skiing defined "monopolization" exactly as did the Court of Appeals in this case. *Compare* 53 U.S.L.W. at 4822 *with* Pet. App. at A-12. *Aspen Skiing* also held, with great relevance to this case, that:

— Liability for monopolization is supported by evidence of "specific intent" to harm a competitor, 53 U.S.L.W. at 4822 such as the statements made by Kaiser, see p. 5 above.

— Predatory intent may be inferred from action by a monopolist that has "no valid business reason." *Id.* at 4824 n.39. Kaiser introduced no such evidence.

— Predatory intent may be inferred from failure to offer any efficiency justification for the monopolist's pattern of conduct. *Id.* at 4823. Kaiser introduced no such evidence.

— Improper exclusionary action includes behavior that "tends to impair the opportunities of rivals" and also which "does not further competition on the merits or does so in an unnecessarily restrictive way." *Id.* at 4823

n.32. Dr. Williamson testified on the anticompetitive consequences of Kaiser's actions. App. 587A-650a.

— "Proof of specific intent to engage in predation may be in the form of statements made by the officers or agents of the company, [or] evidence that the conduct was used threateningly." *Id.* at 4824 n.39. See p. 5 above, concerning threatening statements by Kaiser's manager.

— Proof of predatory intent may also be found in attempts by "[a] monopolist . . . to discourage [others] from doing business with its smaller rival." *Id.* at 4824. *See* p. 5 above concerning the threatening statements to Alcoa.

The record, when viewed in the light most favorable to Columbia, as it must be under *Aspen Skiing, Id.* at 4824, shows that the jury was justified in finding Kaiser liable for monopolization, pursuant to a jury charge by the trial Court totally consistent with traditional Section 2 case law. Indeed, Kaiser has never claimed the district court erred in its jury instructions on the issue of monopolization. In fact, the district court in this case framed the issues just as they were framed by the trial court's instructions in *Aspen Skiing.*[14]

As in *Aspen Skiing,* there was strong and persuasive evidence of intent to exclude a competitor. *Aspen Skiing* rejected the argument that the Court of Appeals' interpretation of Section 2 in that case imposed some "duty" on a monopolist to act a certain way. Kaiser's attempt to seek to graft onto the court of appeals' opinion in this case a similar "duty" is an attempt to make the decision of the court of appeals appear to be an improper extension of Sherman Act Section 2 jurisprudence. This is patently untrue.

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[14] The district court told the jury:

In considering these practices and whether they were illegal or whether they were done with improper retaliatory or anticompetitive intent, the fact that certain things happened by themselves without the requisite intent or motive is not sufficient. So that the fact that Kaiser Aluminum and Sales,

(footnote continues)

F. Kaiser's Claim That The Court Of Appeals' Opinion Is An Improper Extension Of *United States v. Aluminum Co. of America* Is Incorrect

1. The "Price Squeeze" Issues in this Case are Fact-bound and Unique to the Special Facts Presented

Kaiser's petition argues, as its principal contention on the price squeeze issue, that the court of appeals opinion in this case was an improper and "dangerous" expansion of the "price squeeze" theory expressed in *United States v. Aluminum Corp. of America,* ("Alcoa") 148 F.2d 416 (2d Cir. 1945). It asserts two reasons, neither of which apply to the facts in this case.

First, Kaiser argues that because it never sold aluminum coil to Columbia after April 1971, it cannot be liable. Kaiser, in advancing this argument, conveniently overlooks the specific evidence in the record showing Kaiser's 80% plus share of aluminum coil sales, and also showing that, because of Kaiser's price leadership in setting coil prices, Kaiser knew full well that its actions, in dramatically raising the raw material price in 1974, would injure Columbia.[15]

(footnote continued)

whether or not by the consent or agreement of its parent, KACSI, established a plant to fabricate culvert pipe in New Castle is not by itself a violation of the antitrust laws. Simply to offer lower prices for culvert pipe than some other company did on some bid is not in itself evidence of unlawful conduct. The fact that Kaiser named Mr. Kennedy as its distributor of Kaiser products in this area in itself is not illegal because as you know manufacturers do appoint independent distributors and the law permits this.

Size alone isn't monopoly power. In order to establish monopoly power you have to as I said show the power to set prices, the power to exclude competiton, and you have to show willful exercise of this power for an anticompetitive effect to harm Columbia.

The question about the motive with which these things were done, whether it was retaliatory or strategy or in the ordinary operation of Kaiser's business in an effort to further its own business interest is the question that you have to decide. (App. 3961a-62a)

[15] Kaiser's Highway Products Manager, on cross examination, was confronted with a document he wrote (Ex. P-950, App. 4826a), which showed that he knew Kaiser's changes in raw material prices in 1974 would injure Columbia. Columbia's economic expert, Dr. Oliver Williamson,

(footnote continues)

Second, Kaiser contends that the court of appeals' decision improperly extends the *Alcoa* doctrine, because there was no showing that Kaiser had monopoly power in the raw material market.

This is a "strawman" issue. This was never a case, as was *Alcoa,* about the raw material market, and Kaiser was never accused of monopolizing the raw material market. This case involves only the aluminum culvert pipe market. As the court of appeals noted (Pet. App., at 12 n. 1,), Kaiser, in the court of appeals, did not contest the jury's finding that the relevant product market is aluminum culvert pipe. As noted earlier, Kaiser never requested a jury interrogatory, or instructions to the jury, on a separate raw material market, or a market consisting of both raw material and finished pipe. Thus, Kaiser's contention about the need to prove monopoly power in a "raw material market" was not properly raised and preserved for appeal. See pp. 14-17 above.

Furthermore, Kaiser's Petition also ignores two important pieces of evidence in the record which showed Kaiser did control over 80% of the raw material used for pipe.[16]

Finally, Kaiser's contention, that it cannot be responsible for a price squeeze because it did not sell coil to Columbia, has a hollow ring. It was Kaiser's retaliatory refusal to sell raw

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(footnote continued)

testified that, based on his knowledge and analysis of the industry, Kaiser was a dominant firm in setting the prices for aluminum coil and sheet used in making pipe. He explained how, because of the highly concentrated aluminum industry, Kaiser could injure Columbia even if Columbia was not purchasing from Kaiser. He also testified that Kaiser did in fact act strategically to injure Columbia, which testimony was relied upon by the court of appeals. Pet. App., A-16.

[16] (1) Exhibits P 839-42, App. 8076a-79a, show that Kaiser itself claimed a greater than 80% share of the nationwide sales of raw material used for aluminum culvert pipe.

(2) Exhibit P-2025, entitled "Kaiser Percentage Market Share, Mid-Atlantic Area, Coil Sheet for Aluminum Culvert Pipe" which showed a 75.03% market share for 1973, increasing to over 85% in 1974, over 94% in 1975, over 84% in 1976 (App. 4839a).

material to Columbia which started Columbia's troubles. Kaiser's strategic and unjustified refusal to sell raw material to Columbia after 1971, because of Columbia's insistence on independence in purchasing from Reynolds as an alternate supplier, precludes Kaiser from asserting any right to disclaim liability in this case merely because it did not sell to Columbia during the price squeeze period.[17]

This evidence of power over the prices of raw material also refute Kaiser's claim that there was a void in Columbia's evidence of price leadership.[18]

Considering *all* of the evidence, the court of appeals' opinion is entirely consistent with *Alcoa.*

2. Kaiser's Petition Mischaracterizes the Court of Appeals' Treatment of the Price Squeeze Issue

Respondents never asserted, and the court of appeals did not hold, as Petitioners contend, that any time there is a congruence of raw material and finished goods prices, there is a "price squeeze" which is actionable under the antitrust laws.

What distinguishes this case from a mere congruence of prices was the ample evidence of intentional, strategic, and predatory behavior by Kaiser, of which the price squeeze was but one item. The court of appeals specifically stated that the evidence showed the price squeeze "was not caused by natural market forces" (Pet. App. A-17), was "deliberate" (Pet. App. A-17), and that Kaiser "possessed the power to create the price

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[17] Professor Williamson testified that a dominant raw material supplier's refusal to sell to an independent fabricator can be more injurious than a price increase. App. 649a. Kaiser's refusal to deal in these circumstances was itself unlawful. *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973); *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359 (1927); *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951).

[18] See the evidence cited by the Court of Appeals at Pet. App. A-16. As one additional example of Kaiser's price leadership, Alcoa did not change its published list price from March 1974 through July 1975; however, Alcoa's invoices to Columbia for aluminum coil did change, but were usually within one cent (per pound) of the frequently changing Kaiser published price list. (App. 8080a). These Alcoa "transaction" prices clearly showed Alcoa followed Kaiser's "price leadership."

squeeze, [and] exercised that power to destroy its competition." (Pet. App. A-19).

The economic literature cited in footnote 13 of the Kaiser Brief has no bearing on this case. Many of these articles discuss how the congruence of raw material and finished pipe prices may be caused in the abstract, and only incidently discuss whether or not this mere congruence should be subject to antitrust
liability.[19]

Furthermore, many of the economic articles cited by Kaiser provide support for the decision of the court of appeals in this case. These authors explain that a price squeeze, when shown to be strategic in nature, is anti-competitive and should be actionable under the antitrust laws.[20]

For example, Kaiser's footnote 13 cites an article by M. Adelman, "Integration and Antitrust Policy", 63 Harv.L.Rev. 27 (1949), in which the author provides an analytical review of price squeeze economics, and concludes there are some situations in which a price squeeze may be anti-competitive:

> A large and very wealthy firm which sells in markets separated either by distance or otherwise may be able to cut prices ruinously low at any point, drive out competitors, and achieve a monopoly there; and continue on its way until a stronger competitor or the government puts an end to the snowballing process. This method is classic.

Id. at 45-46.

Furthermore, Kaiser cites, but does not even attempt to distinguish, those few cases in the lower courts that have

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[19] *See e.g.*, M. G. deChazeau and A. E. Kahn, *Integration and Competition in the Petroleum Industry*, (Yale Univ. Press, 1959); Bork, "Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception," 22 U.Chicago L.Rev. 157 (1954); S. H. Whitney, *Antitrust Policies: American Experience in Twenty Industries* (Twentieth Century Fund 1958).

[20] *See e.g.*, E. Singer, *Antitrust Economics* (Prentice-Hall Inc., 1968); Walter Adams, "Vertical Power Dual Distribution and the Squeeze: A case Study in Steel," 9 Antitrust Bull. 493 (1964); A. S. Holmes, "First Generation Price Squeeze Policy at the FERC," 110 Pub. Util. Fort. 32 (1982); J. E. Lopatka, "The Electric Utility Price Squeeze As an Antitrust Cause of Action," 31 UCLA Law R. 563 (1984).

considered a price squeeze. *See United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958), (proposed merger of two steel companies threatening a price squeeze on an independent fabricator, sufficient to warrant enjoining the merger), *United States v. Corn Products Refining Co.*, 234 F. 964 (S.D.N.Y. 1916) (defendant held liable for monopolization because of price squeezes against independent manufacturers of end-products), *City of Mishawaka v. American Electric Power Co., Inc.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (defendant utility held liable for monopolization for "price squeezing" the plaintiff municipal systems by permitting its wholesale rates to be higher and out of balance with lower retail rates).[21]

Thus, Kaiser's economic arguments regarding price squeeze tactics are unsupported by the very authorities which it cites. But more fundamentally, those arguments are irrelevant to this case because they have no relationship to the facts proven at trial, and were not, in any event, properly preserved for this Court's review.

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[21] Although footnote 13 of the Kaiser Brief contains a lengthy listing of articles and decisions that have discussed the price squeeze issue, Kaiser has not cited an authoritative article which analyzes the *Alcoa* decision on the price squeeze issue, and follows the recent development of Section 2 jurisprudence. *See* Ball, "The Vertical Price Squeeze as Predatory Pricing under Section 2 of the Sherman Act," 56 N.C.L.Rev. 735, 740 (1978) (summarizes the modern view of monopolization as stemming from Judge Hand's opinion in *Alcoa;* and explain that a violation may be based upon conduct that excludes competition from the economically "inevitable" to a well-run business).

V. CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

[Excerpt from District Court's Charge]

Now, there has been talk of a price squeeze which Columbia claims was deliberately imposed. In considering the price squeeze you should consider whether the following elements have been proven: First, that during this period whether or not Kaiser's price for aluminum coil offered for sale to fabricators was higher than a fair price for the coil; whether during the period of the alleged price squeeze Kaiser had such a large share of the sales of coil that they had the power to raise the price of coil without reference to competition, bearing in mind that there was evidence that Columbia bought not from Kaiser but from Reynolds and at other times Alcoa; also to consider whether the Kaiser defendants prior to the period of the alleged price squeeze were on notice or were notified that the prices of aluminum coil and aluminum pipe were so close that they resulted in a price squeeze, and I mean by that the prices—you have to consider that the restraint of trade was a restraint of trade in the sale of pipe, and that Kaiser sold both coil and pipe, and you have to consider that we are talking about the effect of a squeeze where the coil was sold by Kaiser but Columbia was purchasing its coil from Reynolds and perhaps Alcoa.

Now, in connection with this price squeeze and in other connections, too, there has been a discussion of the price not only of pipe but the price of coil, and there has been the concept of the transfer price between KACC and KACSI which was referred to by one witness not as a transfer price but as a transfer cost, and you will recall the testimony as to what that was and how it was calculated. I believe that the witness talked about his transfer cost because of the concept that it was the value added to it at stages of production.

You should also consider in regard to this price squeeze, and you may consider in other context as well, the testimony as to whether the sale of coil or pipe was more profitable to Kaiser, to either of the Kaiser defendants.

In order to show that there was a price squeeze Columbia would have to show by the evidence that the Kaiser defendants were dominant or had sufficient power in the raw material market to control the price of the coil or to exclude the competitors, and I mention this in connection with the price squeeze because here we are talking about the price of the raw material and the relevant product market for the coil, and I will be talking to you later of the relevant product market for pipe in talking about the restraint of trade generally and in talking about the attempt to monopolize under Section 2. So when you consider this pricing bear in mind whether you are considering pricing of coil or pricing of pipe and who was selling what to whom. Beyond that I would rely on your own recollection of the testimony, and I don't intend to try and summarize it for you and I certainly have no intention of expressing any opinion about it, but just ask you to bear in mind what prices we are talking about.

CERTIFICATE OF SERVICE

I certify that on this 27th day of July 1985 I served the foregoing brief on each of the parties by sending three copies thereof by first-class mail, postage prepaid, to:

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